LIBRARY
SUPREME COURT, U. S.

SEP 1 1970
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 514

MARIE F. WINKLER,

Petitioner,

against

FREDERICK E. WINKLER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR THE RESPONDENT

JOHN E. HIGGISTON, JR.,
Attorney for Respondent,
29 Broadway,
New York, N. Y. 10006.

INDEX

	PAGE
Opinions Below	1
Jurisdiction	1
Questions Presented	2
Why Certiorari Should Not Be Granted	2
I—The order of the New York Court of Appeals is not a final judgment subject to review under U.S.C. § 1257	2
II—The petition presents no substantially arguable Federal question	5
Conclusion	8

CITATIONS

Cases:

Allen v. Hanks, 136 U. S. 300	6
Bain Peanut Co. v. Pinson, 282 U. S. 499, 502	7, 8
Campbell v. Campbell, 174 Md. 229	8
Clark v. Willard, 292 U. S. 112, 118	3, 5
Cohen v. Beneficial Industrial Loan Corp., 337 U. S. 541, 546	3
Dartmouth College v. Woodward; 4 Wheat. (U. S.) 518, 629	5
Fairbanks v. Commissioner, 191 F. 2d 680 (9th Cir. 1951), cert. den. 343 U. S. 915	7

PAGE

Fuqua v. Fuqua, 268 Ala. 127 8

Gleason v. Gleason, 26 N. Y. 2d 28 ..... 5, 7, 8

Hagen v. Hagen, 205 Va. 791 8

Hanfgarn v. Mark, 274 N. Y. 22, 25 ..... 5, 6

Hurry v. Hurry, 144 La. 877 8

Livingston v. Livingston, 173 N. Y. 377, 382 6

Local No. 438 v. Curry, 371 U. S. 542, 549 3

Mahana v. U. S., 88 Fed. Supp. 285 (Ct. Cl. 1950), cert. den. 339 U. S. 978, rehearing den. 340 U. S. 847 7

Market Street Railway Co. v. Railroad Commission of California, 324 U. S. 548, 551 3

Maynard v. Hill, 125 U. S. 190, 216 5

McGinley v. McGinley, 295 S. W. 2d 913 [Tex.] 8

McGowan v. Maryland, 366 U. S. 420, 425 7

Mills v. Alabama, 384 U. S. 214, 217 4

Morley v. Lake Shore & Michigan Southern R. Co., 146 U. S. 162, 169 6

Neeman v. Commissioner of Internal Revenue, 255 F. 2d 841 (2d Cir.), cert. den. 338 U. S. 841 7

Neilson v. Kilgore, 145 U. S. 487, 491 6

Pope v. Atlantic Coast Line Railroad Co., 345 U. S. 379, 382 ..... 3, 4

Radio Station WOW, Inc. v. Johnson, 326 U. S. 120, 123 3

Randall v. Kreiger, 23 Wall. 137, 148 5

PAGE

Richfield Oil Corp. v. State Board of Eq., 329 U. S. 69, 73 4

Russell v. Russell, 142 F. 2d 753, 754, D. C. Cir. 1944 7

Simons v. Miami First Nat. Bank, 381 U. S. 81, 84 6

Stallings v. Stallings, 177 La. 488 8

Tipping v. Tipping, 82 F. 2d 828 8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 514

MARIE F. WINKLER,

Petitioner,

against

FREDERICK E. WINKLER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR THE RESPONDENT

Opinions Below

The opinions, decisions and orders in the Courts below are as set forth in the petition and the appendix thereto.

Jurisdiction

In this case petitioner seeks review of an order of the Court of Appeals of the State of New York. The order reversed a lower Court's order granting petitioner's motion to dismiss the complaint in a divorce action and remitted the case to the New York Supreme Court for further proceedings. Jurisdiction is invoked under 28 U.S.C.

§ 1257(3) on the ground that the order of reversal is a final order drawing into question the constitutionality of a state statute. The order of the Court of Appeals was entered on May 13, 1970. The petition for certiorari was filed on August 10, 1970.

Questions Presented

1. Whether an order of a State court reversing a lower court's order granting a motion to dismiss a complaint in a divorce action and remitting the case to the trial court for further proceedings is a final judgment or decree subject to review by this Court under 28 U.S.C. § 1257.

2. Whether the application of the "nonfault" provision of the New York divorce statute, Domestic Relations Law § 170 subd. (5), enacted in 1966 and effective September 1, 1967, to parties living apart pursuant to a separation judgment made on December 15, 1960, violates the constitutional rights of the successful party to the separation action where that party does not wish a divorce.

WHY CERTIORARI SHOULD NOT BE GRANTED

I

The order of the New York Court of Appeals is not a final judgment subject to review.

Under U.S.C. § 1257 this Court has power to intervene in State litigation only after "the highest court of a State in which a decision could be had" has rendered a "final" judgment or decree.

"This requirement," Mr. Justice Frankfurter has warned, "is not one of those technicalities to be easily scorned. It is an important factor in the smooth working

of our Federal system". *Radio Station WOW, Inc.* v. *Johnson*, 326 U. S. 120, 123. Especially is this true where the judgment of the State court is one dealing with family relations, an area traditionally reserved to the courts and legislatures of the several States.

The question in each instance is whether, as a consequence of the judgment of the State court, "there is nothing more to be decided". *Clark* v. *Willard*, 292 U. S. 112, 118. The judgment "must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein". *Market Street Railway Co.* v. *Railroad Commission of California*, 324 U. S. 548, 551.

If there is no such showing then the case must fall within "that small class which finally determines claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated". *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541, 546; *Local No. 438* v. *Curry*, 371 U. S. 542, 549.

This is not such a case. The order of the New York Court of Appeals did not effectively terminate the litigation. What it did do was to reverse a lower court order granting defendant's motion to dismiss the complaint and remit the case to the trial court for further proceedings. These further proceedings include answering the complaint, conduct of pre-trial proceedings, trial, and the entry of judgment after trial.

Nor may it be properly claimed, as petitioner suggests (Petition, p. 6), that the order deprived petitioner of her only defense to the action, left the trial court with nothing more to decide and relegated it to the mere ministerial duty of entering judgment. Cfr. *Pope* v. *Atlantic Coast*

Line Railroad Co., 345 U. S. 379, 382; *Mills* v. *Alabama*, 384 U. S. 214, 217; *Richfield Oil Corp.* v. *State Board of Eq.*, 329 U. S. 69, 73.

This is apparent from the local law which the Court may properly look to in determining the question of finality. *Richfield Oil Corp.* v. *State Board of Eq.*, 329 U. S. 69, 72.

Thus, under the very statute under which this divorce action was brought (Domestic Relations Law § 170 subd. (5)), a jurisdictional prerequisite to the maintenance of the action is proof "by the plaintiff that he or she has substantially performed all the terms and conditions of such decree or judgment", i.e., the separation judgment pursuant to which the parties have lived apart. As recently as August 4, 1970, when issue was first joined and petitioner served her verified answer in the divorce action, she denied this jurisdictional allegation of the complaint and, on the basis of that denial, demanded judgment dismissing the complaint. How could it possibly be claimed, therefore, at this posture of the divorce action, that petitioner has been deprived of her only defense or that "there is nothing more to be decided"?

Furthermore, even if it be true, as petitioner suggests, that she has no affirmative defense and that the trial of the action will necessarily result in the entry of a judgment of divorce, this does not mean that petitioner has sustained or will sustain injury or that the constitutional issues sought to be raised here are now ripe for determination. Under applicable provisions of New York law (Domestic Relations Law § 236), the trial court in a divorce action has broad and continuing discretionary powers to provide financially for a divorced wife. Until such time as the trial court has exercised or refused to exercise that discretion in conjunction with the entry of a final decree of divorce, there is no conceivable basis for finding that a "final" judgment reviewable under U.S.C. § 1257 exists. It is only at

that point that intervention by this Court would be proper, for only then will it be possible to say "the suit is at an end" and "there is nothing more to be decided". *Clark* v. *Willard, supra,* at 118.

II

The petition presents no substantially arguable Federal question.

The application of Domestic Relations Law § 170 subd. (5), effective September 1, 1967, to parties living apart pursuant to a separation decree made on December 15, 1960, offends neither due process, equal protection nor the impairment of contracts provisions of the United States Constitution. *Gleason* v. *Gleason,* 26 N. Y. 2d 28.

First, because marriage is not a contract within the constitutional provisions prohibiting the impairment of contracts *Maynard* v. *Hill,* 125 U. S. 190, 216; *Dartmouth College* v. *Woodward,* 4 Wheat. (U. S.) 518, 629; *Hanfgarn* v. *Mark,* 274 N. Y. 22, 25, remittitur amended 274 N. Y. 570, appeal dismissed 302 U. S. 641; secondly, because the legislation so applied does not deprive petitioner of any property interests that are protected by constitutional guarantees of due process; and finally, because the statutory classification is entirely reasonable and proper.

In actual fact, all of the so-called "property rights", which petitioner claims (Petition, p. 7) she has been deprived of by this legislation, are not property rights at all. They are mere expectancies granted by the legislative power as an incident to the marriage relationship and subject to modification or revocation by it at any time. *Maynard* v. *Hill, supra,* at 216; *Randall* v. *Kreiger,* 23 Wall. 137, 148; *Gleason* v. *Gleason, supra,* at 26 N. Y. 2d 40.

The due process clauses are concerned with the protection of vested rights and interests, not mere inchoate rights

or expectancies, and no person has a vested right in a continuance of the law, unchanged, with respect to the marital relationship and inchoate legal rights and incidents growing out of it. *Addison* v. *Kilgore*, 145 U. S. 487, 491; *Allen* v. *Hanks*, 136 U. S. 300; *Hautgarn* v. *Mark*, *supra*, at 274 N. Y. 25.

The assertion (Petition, p. 15) that the final judgment of separation provided petitioner with an unchangeable contract property right subject to the impairment and due process clauses of the Federal Constitution likewise cannot be sustained.

A judgment, as such, unless founded upon an agreement, express or implied, is not subject to the constitutional prohibitions against impairment of a contract *Morley* v. *Lake Shore & Michigan Southern R. Co.*, 146 U. S. 162, 169; and a judgment of divorce or separation, lacking the necessary element of consent, is not within that category *Livingston* v. *Livingston*, 173 N. Y. 377, 382, although it may be subject to the due process clauses if it creates substantial property rights Idem, at p. 382.

Petitioner's judgment of final separation, however, granted her no property rights. *Simons* v. *Miami First Nat. Bank*, 381 U. S. 84, 84. The various so-called property rights described by petitioner did not flow to her from the separation decree, nor were they provided for therein. They were mere inchoate legislative grants which petitioner already possessed as an incident to her marital status, and were alterable by the Legislature at any time. The only right even remotely resembling a property right acquired by petitioner under her final decree of separation was the right to alimony, but even that was not an absolute or final right since under the law as it existed at that time (C.P.A. § 1170), as under existing New York law (Domestic Relations Law § 236), it was at all times, even after final judgment, subject to annulment or amendment.

As for equal protection, the Constitution requires only that statutory classifications or distinctions be reasonable and not arbitrary or capricious. *McGowan* v. *Maryland*, 366 U. S. 420, 425.

There is nothing arbitrary or unreasonable in a legislative enactment that treats spouses separated pursuant to a decree as in one class and spouses separated pursuant to an agreement in another. *Gleason* v. *Gleason*, *supra*, at 26 N. Y. 2d 41. In fact, it is common practice.

Our Federal income tax laws furnish a good example of this. Thus, in 1942 a provision was added to what is now Section 71 of the Internal Revenue Code taxing alimony paid pursuant to a separation decree to the wife, but in no way affecting alimony paid pursuant to a separation agreement. The purpose of the amendment was to relieve divorced and separated husbands of the tax burden on amounts paid as alimony and to shift that burden to the wife. *Russell* v. *Russell*, 142 F. 2d 753, 754, D. C. Cir. 1944. The statute in its original form, taxing only wives separated by decree and not those separated by agreement, was held to be constitutional, applicable to divorce and separation decrees in existence at the time of the amendment and prior thereto and not violative of due process and other constitutional guarantees as so applied. *Mahand* v. *U. S.*, 88 Fed. Supp. 285 (Ct. Cl. 1950) cert. den. 339 U. S. 978, rehearing den. 340 U. S. 847; *Fairbanks* v. *Commissioner*, 191 F. 2d 680 (9th Cir. 1951), cert. den. 343 U. S. 915; *Neeman* v. *Commissioner of Internal Revenue*, 255 F. 2d 841 (2d Cir.), cert. den. 338 U. S. 841. It was not until twelve years later, in 1954, that a provision was added to the statute taxing wives with alimony received pursuant to separation agreements.

In addition to our Federal laws, the laws of other States, which may be looked to in determining whether a classification is reasonable *Bain Peanut Co.* v. *Pinson*, 282 U. S. 499,

502, contain identical or similar classifications. Cf. Ala. Stat. § 22(1); Minn. Stat. Ann. § 518.06.

Finally, as Judge Fuld pointed out in the *Gleason* case, *supra*, at page 42, "we note that, when confronted with constitutional challenges such as those now urged upon us, the high courts of a number of jurisdictions have upheld the retroactive application of similarly constructed legislation permitting divorce either where the parties had been living apart pursuant to an 'old' separation decree (see, e.g., *Stallings* v. *Stallings*, 177 La. 488; *Hagen* v. *Hagen*, 205 Va. 791) or where they had simply been living apart for a specified period. (See, e.g., *Tipping* v. *Tipping*, 82 F. 2d 828; *Fuqua* v. *Fuqua*, 268 Ala. 127; *Hurry* v. *Hurry*, 144 La. 877; *Campbell* v. *Campbell*, 174 Md. 229; *McGinley* v. *McGinley*, 295 S. W. 2d 913 [Tex.]. See, also, Ann., Divorce Statute—Retrospective Effect, 23 ALR 3d 626, 633-636.)"

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

JOHN E. HIGGISTON, JR.,
Attorney for Respondent,
29 Broadway,
New York, N. Y. 10006.

New York, N. Y., August 25, 1970.

LIBRARY
PREME COURT, U. S.

Supreme Court, U.S.
FILED
SEP 2[illegible]
E. ROB[illegible]

IN THE

Supreme Court of the United States

October Term, 1970

No. 514

MARIE F. WINKLER,

Petitioner,

against

FREDERICK E. WINKLER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

PETITIONER'S REPLY MEMORANDUM

ZENAIDA DRABKIN,
Attorney for Petitioner,
84 William Street,
New York, N. Y. 10038.

MORTIMER H. KOENIG,
GRACE H. CONNELL,
JESSE SISKIND,
On the Brief.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 514

MARIE F. WINKLER,

Petitioner,

against

FREDERICK E. WINKLER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

PETITIONER'S REPLY MEMORANDUM

Respondent at page 3 of his brief states that in order for this Court to consider a review of the order of the New York Court of Appeals, it must fall within "that small class which finally determines claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated". *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541, 546; *Local No. 438* v. *Curry*, 371 U. S. 542, 549.

It is first to be noted that in the very next sentence following the foregoing quotation, the Court added this significant comment: "The Court has long given this provision of the statute this practical rather than a technical construction." Petitioner urges that since there is here a fundamental clear cut issue of constitutional law basic